STATE OF MICHIGAN

COURT OF APPEALS

BRAD ALLEN DOUBLE, d/b/a MORENCI CHIROPRACTIC CLINIC, Plaintiff-Appellant, v BANK OF LENAWEE, Defendant-Appellee.	UNPUBLISHED September 27, 2005 No. 262541 Lenawee Circuit Court LC No. 04-041570-CZ

Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand for further proceedings.

I. FACTS

Plaintiff, a doctor of chiropractic medicine, regularly deposited the proceeds of his practice with defendant. In 1999, plaintiff hired an office manager and authorized her to make deposits on his behalf, but this authorization did not extend to allowing her to take cash from any of those deposits. In June 2003, plaintiff learned of a problem with his accounts, immediate investigation of which revealed that the office manager had been embezzling from him. According to plaintiff, the office manager routinely siphoned money from his deposits by filling in figures on the "less cash received line" of deposit slips, and by requesting the proceeds of certain checks in whole or in part despite her having indicated no such thing on any deposit slips. Defendant provided the cash requested, despite plaintiff's routine practice of endorsing checks with notice that they were for deposit only. Plaintiff further complained that the office manager routinely used her position to remove the true deposit slips from the monthly statements that defendant sent to plaintiff and replaced them with slips fabricated by her to conceal her actions.

Plaintiff reports that he brought a civil action against the office manager, which the parties settled, but that the office manager faced criminal charges as well, which resulted in her conviction and imprisonment. Plaintiff separately brought this action against defendant, setting

forth counts of failure to exercise care and act in good faith, breach of contract, negligence, conversion, money had and received, and violation of the Uniform Commercial Code (UCC).[1]

The trial court granted summary disposition to defendant, on the grounds that defendant performed as necessary pursuant to the UCC, and that a one-year period of limitations set forth therein was fatal to plaintiff's claims. This appeal followed.

II. STANDARD OF REVIEW

"We review a trial court's decision with regard to a motion for summary disposition de novo as a question of law." *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Statutory interpretation likewise presents a question of law, calling for review de novo. *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 227; 532 NW2d 903 (1995).

"In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

III. ANALYSIS

In granting defendant's motion, the trial court explained, in pertinent part, as follows:

> [O]n the UCC defense and the one-year statute of limitations, I think that those are very clear. I don't think that creates a question of fact for the jury. In fact, I think that under these circumstances it's simply a question of law. I think that the bank did what it's required to do in that regard, in regard to sending out the statements, and a one-year statute of limitations certainly does apply.

The UCC defense upon which defendant relied is set forth at MCL 440.4406, the pertinent provisions of which state as follows:

> (3) If a bank sends or makes available a statement of account or items . . . , the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.
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> (4) If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on the customer by subsection (3) the customer is precluded from asserting against the bank the following:

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[1] MCL 440.1101 *et seq.*

> (a) The customer's unauthorized signature or any alteration of the item, if the bank also proves that it suffered a loss by reason of the failure.
>
> (b) The customer's unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of time, not exceeding 30 days, in which to examine the item or statement of account and notify the bank.
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> * * *
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> (6) Without regard to care or lack of care of either the customer or the bank, a customer who does not within 1 year after the statement or items are made available to the customer . . . discover and report his or her unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration. . . .

We conclude that defendant is not entitled to summary disposition on the basis of the above statutory provisions, because, based on the record before us, this case involves neither unauthorized signatures nor altered items. Plaintiff does not allege that the office manager tampered with any endorsements. Moreover, an agent authorized to fill out deposit slips who then exceeds the scope of her authority in doing so is not altering an item, but rather using her status as the principal's agent to embezzle from him. The same characterization applies wherever the office manager in this case bypassed the cash-returned parts of deposit slips while using defendant's personnel's familiarity with her as plaintiff's agent to persuade them to allow her to take cash from checks whose endorsements indicated that they were for deposit only, or otherwise nowhere suggested that Cole was entitled to take from them.

> "Where a check is drawn to the order of a bank to which the drawer is not indebted, the bank is authorized to pay the proceeds only to persons specified by the drawer; it takes the risk in treating such a check as payable to bearer and is placed on inquiry as to the authority of the drawer's agent to receive payment." [*Allis Chalmers Leasing Services Corp v Byron Center State Bank*, 129 Mich App 602, 606; 341 NW2d 837 (1983), omitting footnotes and quoting with approval 9 CJS, Banks and Banking, § 340, p 683.]

In this case, defendant took the risk in paying to Cole proceeds from checks written to and endorsed by plaintiff. Because MCL 440.4406 does not apply to the instant facts, it provides no defense to plaintiff's claims.

For these reasons, we reverse the result below and remand for further proceedings. We decide this case solely on the basis that the statutory defenses offered by defendant, which the trial court accepted, are not applicable. We express no opinion concerning the substantive merits of any of plaintiff's claims, other defenses that might be raised, or any limitations on plaintiff's right to recover from defendant resulting from his settlement with the embezzling office manager.

Reversed and remanded. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Bill Schuette